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Lee's position as a United States Senator or Senator Lee's campaigns (2010 or 2016), and Mr. McMillan would have entered into these transactions even if Senator Lee were neither a candidate nor a sitting United States Senator.⁸

The Complaint says that "[g]iven the appearance that these transactions were prearranged, Complainants allege that these transactions were not negotiated at arms-length and may have been arranged at prices other than fair market value, thus resulting in a contribution of value from McMillan to Lee." Even if the transactions were not conducted at fair market value – which is simply not the case – they would have nothing to do with the Federal Election Campaign Act. Accordingly, the Commission should dismiss the complaint against Mr. McMillan promptly because there is no reason to believe that a violation of the Federal Election Campaign Act occurred.⁹

DISCUSSION

The allegations in the complaint are meritless for three reasons.

1. **The private purchase of a house and the leasing of a house are not subject to the Federal Election Campaign Act.**

The complaint alleges that the sale and lease constitute a "contribution" from Mr. McMillan to Senator Lee. The FECA defines a "contribution" to include gifts, loans, advances, or anything of value, but only if it is made "for the purpose of influencing any election for Federal office."¹⁰ The Commission has repeatedly held that purchasing a house is quintessentially a private act not subject to the FECA.¹¹ The Commission has explained that a candidate's purchase of a home must, by definition, be done with personal funds and cannot be subsidized with campaign funds under 11 C.F.R. § 113.1(g)(1)(i)(E).¹² Ac-

⁸ *Id.* ¶ 11.

⁹

we are submitting a motion to the Commission today to split the allegations against Mr. McMillan into a separate MUR so that it can be resolved promptly.

¹⁰ 2 U.S.C. § 431(8)(A)(1).

¹¹ See, e.g., Statement of Reasons, Commissioners McDonald, Mason, Sandstrom, Smith, and Thomas, MUR 4944 (*In re Hillary Rodham Clinton*) (Aug. 28, 2001) ("Clinton Loan MUR").

¹² *Id.* at 3.

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cordingly, loans made to a candidate to purchase a house are not considered to be loans to the committee, absent some indication that the loan is made in connection with an election or because of the person's candidacy.¹³ The same logic must hold true in the sale of Senator Lee's home and his decision to lease Mr. McMillan's home.

The Commission has wisely recognized that even if a home sale may have some bearing on a campaign, "the Commission will not necessarily therefore deem expenses arising from such controversies to be campaign expenses."¹⁴ The transactions at issue here occurred well after the 2010 election and well before the 2016 election. As such, it is hard to understand how they could possibly have been made in connection with a federal election, given that there has not been a federal election in which Senator Lee's home sale and lease from Mr. McMillan has ever been an issue.

2. The private transactions meet all of the criteria the Commission has applied to exempt activity from the Federal Election Campaign Act.

The Commission's regulations provide that third-party payments of expenses (e.g., leasing a house at less than fair-market value or participating in a sale at less than fair-market value) are contributions "unless the payment would have been made irrespective of the candidacy."¹⁵ The Explanation and Justification for this section says that "[i]f a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy."¹⁶ The Commission has articulated three factors to determine the status of third party payments:

- a) Whether receipt of funds for living expenses would free-up other funds of the candidate for campaign purposes;

¹³ *Id.* at 3.

¹⁴ *Id.* at 2 & n.2.

¹⁵ 11 C.F.R. § 113.1(g)(6).

¹⁶ Explanation and Justification, Contribution and Expenditure Limitations and Prohibitions: Personal Use of Campaign Funds; 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995).

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- b) Whether the candidate would have more time to spend on the campaign instead of pursuing his or her usual employment, and
c) Whether the funds would not have been donated but for the candidacy.¹⁷

Applying all of these factors to the transactions shows that they were not campaign related.

a.) ***Freeing Other Funds:*** The sale of Senator Lee's house occurred almost six months after the 2010 election and five and a half years before Senator Lee's next election in November 2016. This is far more time before the next election than was present in MUR 5141 where the Commission found no reason to believe a loan made to pay off a Member of Congress's legal fees was not made in connection with an election.¹⁸ In March and June of 2010 (two years before the sale), Senator Lee lent his primary campaign a total of \$125,000, all of which he repaid in October 2010 (seven months before the sale). FEC records show that he did not provide any additional personal funds to his 2010 campaign and has not provided any personal funds to his campaign in the 2016 cycle. The home sale occurred in May 2011. Accordingly, as the Commission found in MUR 5141, "[t]here [is] no indication here that the loan freed-up other funds for campaign purposes."¹⁹

b.) *Time on the Campaign:* Nothing about the transactions here suggest that they were undertaken to free up Senator Lee to spend more time campaigning. As noted above, the next election was over four years away at the time of the transactions.

c.) **But-For Test:** The Commission has explained that the third-party payment regulations ask “whether the payment would have been made by the third party irrespective of the Federal candidate’s candidacy for office.”²⁰ As the Commission explained, the test looks to whether “the third party [would] pay the expense if the candidate was not running for Federal office.”

¹⁷ Statement of Reasons, Commissioners Mason, Sandstrom, McDonald, Smith, Thomas, Wold MUR 5141 (In re The Honorable James P. Moran, et. al.) ("Moran MUR") (Apr. 17, 2002) at 4.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 4.

²⁰ Advisory Opinion 2008-18 at 4.

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fice? If the answer is yes, then the payment does not constitute a contribution."²¹

The only allegation made that attempts to suggest that Mr. McMillan engaged in either the sale or lease transaction because Senator Lee was a candidate for Federal office or that they were not made irrespective of the candidacy is that Mr. McMillan also made a lawful and fully disclosed contribution to Senator Lee. According to the Commission's data, so too did approximately 480 other Utah residents in the 2010 cycle. Presumably the Commission will not analyze every transaction Senator Lee had with these individuals without some concrete factual assertion other than their contribution as the basis for an improper transaction.

As the Commission has stated, in order to find a reason to believe based on the allegations in a complaint, there must "be some indication the payment would not have been made "irrespective of the candidacy." ²² Just like the Commission's decision to dismiss the complaint alleging impermissible contributions from donors who helped President and Senator Clinton move to a new home in New York, the complaint against Mr. McMillan "failed completely to address, much less provide any evidence regarding, this essential element of the violation it alleged." ²³

As stated in his declaration, Mr. McMillan wanted to buy Senator Lee's house because it was available at a low price and Mr. McMillan leased his old house to Senator Lee because of a conversation the two men had at church. ²⁴ Specifically, Mr. McMillan understood that Senator Lee wanted to stay in the neighborhood and Mr. McMillan wanted to be able to sell the house in a better real estate market. ²⁵ As such, Mr. McMillan entered into the transactions for reasons other than Senator Lee's candidacy. ²⁶ As the Commission noted when considering the bank's loan to the Clintons for their New York home,

²¹ *Id.*

²² Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (In re Hillary Rodham Clinton) (Dec. 20, 2000) ("Clinton Move MUR") at 3.

²³ *Id.*

²⁴ McMillan Dec'l ¶¶ 3, 7, 8.

²⁵ *Id.* ¶¶ 8 and 9.

²⁶ *Id.* ¶ 11.

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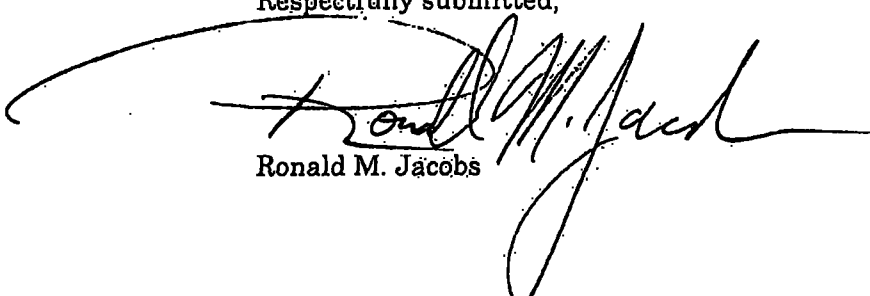
³² *Id.* ¶ 9, 10.

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CONCLUSION

The Commission has explained that it "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA."³³ It has also said that "[c]omplaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented."³⁴ The complaint fails to set forth any facts, only conjecture, about the transactions. Accordingly, the Commission should promptly dismiss the complaint for a lack of reason to believe.

Respectfully submitted,


Ronald M. Jacobs

Enclosure

³³ Clinton Move MUR at 1.

³⁴ *Id.*